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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 952

ALICE DUNN, KATIE DUNN, HELEN DUNN, AND MARY MEANEY, AND ALICE DUNN, KATIE DUNN, AND HELEN DUNN, AS INDEPENDENT EXECUTRICES SUBSTITUTED IN PLACE OF JOHN DUNN, DECEASED,

Petitioners,

vs.

REPUBLIC NATURAL GAS COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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C. K. WALSH,
JOHN C. NORTH,
WILLIAM R. WATKINS,
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Reported Below, 124 F. (2d) 128

To the Honorable, the Supreme Court of the United States:

The court below on December 2, 1941 (rehearing denied January 16, 1942, R. 469-475), allowed petitioners to recover for gas belonging to them, which was wilfully converted by the respondent, on the basis of its value for the use to which it was put by respondent after being converted, which was one cent per thousand cubic feet (R. 108).

The question is whether the court had authority to disregard the Texas law, which allows the injured party to recover in such case, the highest market value of property

converted, which indisputably was five cents per thousand cubic feet (R. 61-83, 347-348, and Exhibit 2 referred to). Such being the question, only the facts pertinent to it will be stated.[1]

Statement of the Matter Involved.

John Dunn and his wife, both deceased, gave oil and gas leases to respondent's predecessors, providing for operations thereon at the sole expense of the lessee and reserving title to one-eighth of all gas produced as a royalty interest, which royalty the lessee was required to deliver or sell for the royalty owners (R. 21, 41).

Between September 1, 1937, and May 31, 1939, respondent produced 13,046,402,000 cubic feet of gas on the Dunn and other leases (R. 85) in the same area, which it sold to the City of Corpus Christi, Texas, and to the Houston Gulf Gas Company for five cents per thousand cubic feet ($604,-315.00, R. 63-81), swearing each month in a report to the Comptroller as required by Texas law,[2] that the reasonable

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[1] Petitioners had sued to recover for this gas (a) five cents per m. c. f. under a gas sales contract with respondents, and (b) five cents per m. c. f. as the value of the gas wilfully converted (R. 13-18). The Court held that petitioners were not entitled to recover on the contract (R. 474), and no point is here made on that holding.

[2] Vernon's Texas Civil Statutes, 1936, and supplement thereto, 1939, Article 7047b provides that:

> "every person * * * in the business of producing * * * natural gas, including casinghead gas, from the soil * * * of this State, * * * shall make * * * a report to the Comptroller, under oath, * * * showing the total amount of such natural gas produced and saved by producer from each well, in this State * * *. The Comptroller shall prescribe the form of such report, which, * * * shall show the total amount of natural gas produced and saved by said producer.
>
> "A tax shall be paid by each such producer * * * on the amount of gas produced and saved * * * upon the following basis:
>
> "* * * a tax equivalent to three (3%) per cent of the market value of the total amount of gas produced and saved within this State, or sold, if imported into the State, at the actual market value thereof as and when produced * * *."

market value of all gas produced by it in Texas was five cents per thousand cubic feet.[3]

The Dunn leases produced over 6,390,912,000 cubic feet of gas with oil during the aforesaid period. The production was run into separators where the oil drained off the lower levels while the gas flowed out near the top through pipe lines (R. 84-85, 429, 438-439), as follows:

1. One gas pipe line was connected to the City of Corpus Christi and to the Houston Gulf Gas Company's trunk pipe line, and 3,624,000,000 cubic feet of gas was sold and delivered to the City and Houston Gulf Gas Company at five cents per thousand cubic feet (R. 81, 472).

2. In the early summer of 1937 the respondent proposed that petitioners permit the use of some of their gas, produced from wells on one of the Dunn tracts, for the purpose of jetting[4] other wells, offering to pay petitioners $300.00 per month for the privilege.[5] When petitioners refused, the respondent arbitrarily connected another pipeline to the gas outlet of the separators and took the remaining 2,765,912,000 cubic feet, as produced, and used it to jet other wells (R. 83-86, 358-369). For use in jetting gas was then worth only one cent per thousand cubic feet (R. 108).

The Circuit Court of Appeals held that one-eighth of the gas used by respondent to jet wells belonged to petitioners,

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[3] The reports made by respondent recite:

"* * * I have to report that the total gas produced and subject to taxation, without any deductions whatsoever for the month of —— is * * *. Average market value of $.05 per M. C. F." The affidavit attached states "that the foregoing report shows the total amount of gas produced and saved, and subject to taxation * * * and the average market value of said gas."

[4] "Jetting" is a term used to designate the operation of an oil well when gas produced from another well is conducted through a pipe line under its natural pressure into the bottom of the oil well, where such gas pressure raises the oil to the surface of the earth (R. 60).

[5] Over $7,000.00 for the period gas was used, as compared to $3,457.39 allowed by the Court.

that it was wilfully converted by respondent, and that petitioners were entitled to recover the reasonable value thereof, but could only recover the value of its use by respondent for jetting purposes, $3,457.39 with interest (R. 472-475). The court ignored the undisputed fact that this gas was produced at the same time, in the same way, and with the gas sold as aforesaid, which respondent claimed on oath to the Comptroller was of the reasonable market value of five cents per thousand cubic feet.

The bases of the holding are obscure but seem to be that after one has converted gas belonging to another he may defeat the owner's right to recover the full reasonable market value thereof by showing that (1) there was no market for the converted gas except for jetting wells, (2) that such converted gas may reasonably be used to jet wells, and (3) that petitioners were benefited by such use of their gas.

Under no principle of Texas law could the respondent sell thirteen billion feet of its own gas for five cents per thousand cubic feet, and when it wanted to jet its wells, wilfully appropriate petitioners' gas, produced at the same time, in the same way, and largely from the same wells, and be liable to them for only one cent per thousand cubic feet. The Texas rule, which the Honorable Circuit Court of Appeals did not follow, is:

1. Where property converted has two values as it may be put to different uses, the owner is entitled to recover the highest value,[6] *Livingston Oil Corporation* v. *Waggoner*, 273 S. W. 903, 907, quoted *infra*, p. 6. In the case of *Southwestern Tel. & Tel. Co.* v. *Krause* (Tex. Civ. App.), 92 S. W. 431, the court said:

> "The contention of appellants that the verdict is excessive is based upon testimony that these cows,

[6] "Where an article has different values as it may be used for different purposes, all of such values should be taken into consideration and the owner is entitled to recover the highest value." 25 C. J. S., Section 88, page 630, 17 C. J. 909.

> although graded milch cows, were without calves or milk at the time and that their then market value was that of beef cows as distinguished from milch cows, a sum less than that found by the jury. Plaintiff testified that beef cows and milch cows were different prices and these were milch cows. It is evident from testimony that the market value of cows which were capable of being used solely for beef would not be the proper measure of damages for cows that were fit for other uses."

And the verdict for the higher value was sustained.

2. The owner is entitled to recover the highest value of the property between the time it is taken and the time suit is filed, where the conversion, as here, is wilful. In *Early-Foster Company* v. *Mid-Tex Oil Mills* (Tex. Civ. App.), 208 S. W. 224, 226, the court said:

> "Where the conversion is not attended with fraud, willful wrong, or gross negligence, the measure of damages is the value of the property converted at the time of such conversion with lawful interest * * *. But where the conversion takes place under either of these circumstances, and the property converted is of changing value, the measure of damages is the highest market value of such property between the date of conversion and the filing of the suit * * *."
>
> "Thus for the reason that, where one's property has been wrongfully taken by another, it does not thereby cease to be the property of the owner; and he may recover such property * * * or he may abandon his title to the same and recover its value. * * * the wrongdoer will not be entitled to the advantage of the fluctuation in value, but will be held to the highest value between the time of his wrongful taking and the filing of the suit, for the reason that he has deprived the owner of the opportunity of obtaining such price. The law will not allow a wrongdoer to speculate as to whether or not, but for his wrongful act, the owner would have sold on such highest market."

3. The owner of property converted is entitled to recover its full value even if there is no going market for it. Conse-

quently, the use to which it is put by the wrongdoer after he has converted it is immaterial, and its value for the use to which it is put is neither a guide nor an aid to determining the owner's damage. Cf. *Olson* v. *U. S.*, 292 U. S. 246. In *Missouri K. & T. R. Co.* v. *Crews* (Tex. Civ. App.), 120 S. W. 1110, the court said:

> "Where property is destroyed and injured which has a market value, this must be shown as the measure of damages; where it has no market value and a real value is shown, this is the measure of plaintiff's recovery; where it has no market value nor a real value but it is shown what it would cost to replace or reproduce the article, then such costs is the measure of damages. But if the article has no market value nor real value and it cannot be reproduced or replaced, then in that event, it would be proper to show what it was worth to the plaintiff, that is to say, what is the actual loss in money sustained by the owner on account of being deprived thereof."

4. One who has converted the property of another may not defeat the owner's right to recover "the reasonable market value of said * * * gas at the time it should have been delivered to him," in whole or in part, by showing that his wrongful act "resulted in the advantage and benefit to both parties in increasing the flow of oil." In *Livingston Oil Corporation* v. *Waggoner* (Tex. Civ. App.), 273 S. W. 903, the plaintiff whose gas was appropriated, was held entitled to recover its *higher* reasonable market value, as against the defendant's contention that as plaintiff was benefited by such appropriation he could recover no more than its *lower* value for the use for which defendant appropriated it, as fixed by the terms of a contract between defendant and a third person. The court (p. 907) said:

> "The fact that such oil produced was largely increased by the use of the vacuum might be offset against

the fact that the life of the well was shortened; however, the question might not be considered from that viewpoint. *It was incumbent upon appellant to get all the oil possible out of the well, and to use all legitimate means of doing so.* This was not only its duty, but it was incumbent upon appellant to do so. * * * Because, by the exercise of diligence and judgment, the appellant largely increased the production of the well, which resulted to the benefit of both Waggoner and appellant, would not entitle it to appropriate the casing-head gas. *Appellant would have as much right to say, as the production has largely increased, we are entitled to the increase, because we were diligent in applying modern methods to the withdrawal of the oil from the earth, and for that reason we are entitled to the increase.*

"The contention of the defendant that the recovery should be limited to the one-eighth it received under the contract with the Skelly Company cannot be sustained. The contract provided for the delivery of the oil, and under our holding, of the casing-head gas, to Waggoner. There was no provision, express or implied, that the defendant had the right to exercise any judgment in the disposition of such oil and casing-head gas they were bound under the contract to deliver the same to Waggoner. The contract with the Skelly Company, therefore, under no rule of law, can furnish a measure of recovery for Waggoner; such contract having been executed without his knowledge or consent, and without authority, express or implied. Waggoner was entitled to the delivery of the casing-head gas to him, and, in the event of failure of the defendant to comply with its contract by which he suffered the loss of his one-eighth royalty in the casing-head gas, *the measure of his recovery was the reasonable market value of said casing-head gas at the time it should have been delivered to him.*

"The fact that the contract with the Skelly Company was made in good faith does not alter the rule. There was no question of good faith in the performance of the terms of the contract between Waggoner and de-

fendant—defendant's duty was to deliver the oil and casing-head gas. *That it resulted in the advantage and benefit to both parties in increasing the flow of oil does not prevent a recovery by plaintiff for such casing-head gas produced.*"

Jurisdiction and Reasons for Granting the Writ.

This Honorable Court has jurisdiction under 28 U. S. C., Section 347a (Judicial Code, Section 240a).

The writ should be granted because the Honorable Circuit Court of Appeals, acting beyond its constitutional powers deprived petitioners of the right to have their case heard, determined, and disposed of under the applicable law of Texas. *Erie R. R. Co.* v. *Tompkins,* 304 U. S. 64; *West* v. *A. T. & T. Co.,* 311 U. S. 223.

WHEREFORE, petitioners pray that a writ of certiorari be granted herein and that upon hearing hereof the error in the decision and judgment in the Honorable Circuit Court of Appeals be corrected.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

315 U.S. 821

No. 952

ALICE DUNN, KATIE DUNN, HELEN DUNN, and MARY MEANEY, and ALICE DUNN, KATIE DUNN, and HELEN DUNN, as Independent Executrices Substituted in Place of JOHN DUNN, Deceased,

Petitioners,

vs.

REPUBLIC NATURAL GAS COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

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NUECES PRINTING COMPANY CORPUS CHRISTI

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IN THE

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OPINIONS BELOW

The opinion of the Circuit Court of Appeals, Fifth Circuit, (per Hutcheson, Justice) is reported Dunn, et al. vs. Republic Natural Gas Company, 124 Federal (2nd) 128. The District Court's judgment has not been officially reported but appears at R. 112.

STATEMENT OF THE CASE

The Circuit Court of Appeals in its opinion (R. 469-475) sets out the matters involved. The statement as made by petitioners is completely contradictory of the statement of the Circuit Court of Appeals. The suit involves only the question of the amount of royalty, if any, that was due petitioners for 2,765,912 m. c. f. of gas, which respondent had used for jetting purposes. The trial court appointed a Master who heard the evidence and made fact findings. (R. 54-89). The trial court, after considering the evidence, the Master's findings, and the argument of counsel, prepared its own findings and conclusions. (R. 104-112.) On appeal, the Circuit Court of Appeals allowed petitioners to recover a royalty of one-eighth (1/8) (the royalty stipulated in the lease, R. 21) of the market value of the gas so used, in accordance with the terms of the lease and the contract of September 30, 1930. (R. 31).

Petitioners, in their application, omitted any reference to the contract of September 30, 1930. (R. 31). Under the terms of that contract, the respondent had the right to operate petitioners' lease without taking any gas. (R. 475). For this privilege, respondent had contracted to pay in excess of $250,000, and it has faithfully performed its part of the contract for more than ten years.

THE PETITION ADVANCES NO SUFFICIENT REASON FOR ISSUING A WRIT OF CERTIORARI.

As the sole ground for granting the writ, petitioners presented the question on pages 1-2 of their application:

> ". . . . whether the court had authority to disregard the Texas law, which allows the injured party to recover in such case, the highest market value of property converted, which indisputably was five cents per thousand cubic feet . . . ."

Thus, it is apparent that petitioners contend that the gas involved in this litigation was, first, converted by respondent and, second, that the market value of the gas was five cents per thousand cubic feet. Reply to these contentions will be made briefly in that order.

I. There is presented in the application of petitioners no question of public importance such as would authorize this Court to assume jurisdiction by certiorari, the question involved being merely one of local law of the State of Texas, arising under contracts.

II. The decision of the Honorable Circuit Court of Appeals is not in conflict with the Texas decisions cited by petitioners for that purpose.

A. There was no conversion in the case before the bar. The respondent owned the leasehold interest in all of the gas on petitioners' land and, under the terms of the lease (R. 21) and the contract of September 30, 1930 (R. 31), respondent had the right, subject to minimum payment requirements, to take or not to take gas from petitioners' land. Under the terms of the contract, if respondent elected to take and did take gas from petitioners' land, then, after paying the minimum requirement, it was obligated to pay royalty only on the market price for the remainder of the gas taken. Respondent having the contractual right to take the gas, there could be no conversion.

This conclusion is supported by the findings of the trial court and of the Circuit Court of Appeals.

(1) Petitioners, on pages 3 and 4 of their application, assert that:

> "The Circuit Court of Appeals held that one-eighth of the gas used by respondent to jet wells belonged to petitioners, that it was wilfully converted by respondent . . . ."

This assertion of conversion is in direct conflict with the opinion of the Circuit Court of Appeals and, we respectfully submit, is a mis-statement of that opinion. In this connection, the Circuit Court of Appeals, speaking through Justice Hutcheson, said:

> "Nothing in the leases or the contract obligated defendent to take any gas from plaintiff, and if defendant was so minded, it could operate the properties for the 21 years, without (fol. 478) taking a foot of gas. Such gas as it takes and sells it credits first to the minimum and they (then) pays for it at prices it receives. Beyond this the contract imposes no obligation upon it. Under the facts of this case showing that the use of the gas for 'jetting' was *reasonable and for the benefit of both plaintiffs and defendants, plaintiffs cannot complain of the use by defendants*, but only of its failure to pay plaintiffs for its part of the gas so used, the reasonable value thereof." (R. 474-475). (Italics ours).

(2) The trial court, like the Circuit Court of Appeals, held that the only market for the gas was for "jetting" purposes and that the respondent had the right to take the gas from petitioners' land:

> "There was no market for the 2,765,912 M. C. F. of gas except for 'jetting' purposes. The market price during the period in controversy, for gas for such purposes, was one cent (1c) per thousand cubic feet." (Finding, 15; R. 108).

> "Under Paragraph 3 on the contract of September 30, 1930, defendant had the right to take more gas from plaintiff's land than the minimum provided in said contract and to account to the plaintiffs for ⅛th of whatever price defendant received for said excess." (Conclusion, 5; R. 110).

B. Plaintiffs' contention that the value of the gas was undisputedly five cents per thousand cubic feet is in direct conflict with the evidence, the finding of the Master, the trial court's finding, and the holding of the Circuit Court of Appeals.

(1) The Master found:

> "The reasonable market value of gas for 'jamming' oil wells during the period of July 1, 1937, to July 5, 1939, was 1c per thousand cubic feet of gas." (Finding XXI; R. 88).

(2) The trial court found:

> "There was no market for the 2,765,912 M. C. F. of gas except for 'jetting' purposes. The market price during the period in controversy, for gas for such purposes, was one cent (1c) per thousand cubic feet." (Finding, 15; R. 108).

(3) The Circuit Court of Appeals held:

> "The Master and the district judge found that there was no market for the gas in question except for 'jetting,' and that the market price for this use was one cent per m. c. f., and this finding as to the market price is not questioned." (R. 474).

III. The petition does not present a question of law. On the contrary, two questions of fact are presented. First, was there a conversion? Second, what was the market value of the gas? Respondent respectfully submits that since it had the contractual right to take the gas and since

the lower courts have found that the use which respondent made of the gas was reasonable and justified, there could be no conversion. The Master, the trial court, and the Circuit Court of Appeals each found that the market value of the gas in controversy was one cent (1c) per thousand cubic feet, and the Circuit Court of Appeals allowed petitioners to recover their royalty on that basis for the 2,765,912 m. c. f. of gas.

CONCLUSION.

It is respectfully prayed that the petition for certiorari be denied.

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